LEE LAU & SONS REALTY SDN. BHD.

v.

TAN YAH & ORS.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
ABDUL HAMID FJ
GEORGE SEAH FJ
[CIVIL APPEAL NO. 70 OF 1982]
30 MARCH 1983

TORT: *Negligence - Duty of occupiers towards invitee - Whether merely to use reasonable care to prevent damage from unusual danger known to occupier.*

The appellants operated a brick-making factory in Kepong, Selangor. They owned a forklift machine which was under the management of the late Tan Kam Sing ("the deceased") at the material time. The deceased died as a result of injuries received when the forklift which had been mechanically packed up at the request of the foreman, collapsed on him. A claim for damages was brought by his dependants (the respondents). The trial Judge held the appellants liable in negligence. He found the deceased to be an invitee, who was owed a duty by the appellants not to be placed in a position of danger. The appellants appealed.

Held:

[1] There was ample evidence to support the finding of the learned Judge that the deceased was an "invitee", not a "licensee". [*Pearson v. Lambeth BO.* [1950] 2 KB 353 at p. 366; *Jacobs v. LCC.* [1950] AC 361; *Fairman v. Perpetual Investment Building Society* [1923] AC 74].

[2] The learned Judge had erred in stating the law wider than that laid down in *Indermaur v. Dames* [1866] LR. ICP. 274, which is that the occupier as an invitor must on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know. The Occupiers' Liability Act 1957 does not apply in Malaysia. [*Wheat v. E. Lacon Co. Ltd.* [1966] 1 AER 582 at p. 593; *Lau Tin Sye v. Yusuf bin Muhammad* [1973] 2 MLJ 186].

[3] The act of jacking up the forklift mechanically did not constitute "unusual" danger which might have reasonably been forseen by the deceased in the course of his employment. [*London Graving Dock Co. Ltd. v. Horton* [1951] AC 737].

[4] The onus of pleading and proving "unusual" danger which the appellants knew or ought to have known rested on the respondents and since they had failed to establish it, the appellants owned no duty of care to the deceased.

[Appeal allowed.]

Cases also referred to:
Pearson v. Lambeth BO. [1950] 2 KB 353
Jacobs v. LCC. [1950] AC 361
Fairman v. Perpetual Investment Building Society [1923] AC 74
Indermaur v. Dames [1866] LR ICP 274
Wheat v. E. Lacon Co. Ltd. [1966] 1 All ER 582
Lau Tin Sye v. Yusuf bin Muhammad [1973] 2 MLJ 186
Glasgow Corporation v. Muir [1943] AC 448
London Graving Dock Co. Ltd. v. Horton [1951] AC 737

For the appellants - R. Lazar; M/s. Shearn Delamore & Co.
For the respondents - B. G. Martin; M/s. B. G. Martin & Co.

JUDGMENT

George Seah FJ:

This is an appeal from a judgment of the High Court at Kuala Lumpur.

The facts may be briefly stated and they are as follows:

(a) The appellants, Lee Lau & Sons Realty Sdn. Bhd. operated and may still be operating a brick-making factory at Desa Jaya, Kepong, Selangor. They also owned a forklift machine which was under the management of the late Tan Kam Sing (hereinafter referred to as the deceased) at the material time.

(b) On 15 July 1978 at about 11 a.m. the deceased complained to Lee Swee Meng (DW1), a "Kepala" of the appellants, that the fan belt of the forklift had been broken. This was duly replaced by Chow Kwan Meng (DW2) a foreman of the appellants in charge of general repairs. At about 3 p.m. the same afternoon, the deceased lodged another complaint that the hydraulic pump of the forklift was leaking. At the request of the foreman, the deceased jacked up the forklift mechanically to a height between 5 to 6 feet and used 2 rubber tree stumps to support the heavy horizontal iron bar of the forklift. The foreman went under the raised forklift and saw that the oil ring of the hydraulic pump was leaking badly. While the foreman was away to get a spanner, the deceased went under to have a look at the hydraulic pump, the 2 rubber tree stumps gave way, the forklift collapsed and the heavy horizontal iron bar fell onto the deceased causing him serious injuries from which he later died without recovering consciousness.

(c) A claim for damages was instituted in the High Court by the (i) 1st and 2nd respondents who are the natural parents of the deceased; (ii) 3rd respondent, who is the lawful widow of the deceased and (iii) 4th respondent, who is the infant son of the deceased. All the four respondents claim to be dependants of the deceased.

(d) The learned Judge Ajaib Singh J gave judgment in favour of the respondents and awarded a total sum of RM69,864 as general damages and RM1,022 as special damages.

According to the statement of claim the case of the respondents was grounded on the fact that the deceased was an employee of the appellants and that the accident on 15 July 1978 was caused solely by the negligence of the appellants or their servant or agent. Alternatively, the respondents also averred that the appellants were in breach of their statutory duty under the Factories and Machinery Act 1967 and the regulations made thereunder.

The appellants in their defence denied that the deceased was their employee and averred that the deceased was at all material times an independent contractor. They also denied that they or their servant or agent had been negligent or in breach of any statutory duty. They lastly averred that the accident was caused or contributed to by the negligence of the deceased himself.

After hearing the evidence adduced the learned Judge ruled that there was insufficient evidence to say that the deceased was an employee of the appellants. He also held that the appellants were not in breach of any of the provisions in the Factories and Machinery Act 1967 and the regulations made thereunder. The effect of these rulings is that the respondents

had not succeeded in proving their case as pleaded and there was no cross-appeal by the respondents against these findings of the Court below. In our opinion there was ample evidence to support these findings.

However, the learned Judge found as a fact that the deceased was an independent contractor and might be regarded as an invitee. In *Pearson v. Lambeth BO.* [1950] 2 KB 353 at p. 366 Asquith LJ said:

> ... It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest.

This requirement of community of interest is to be found in many of the cases and was approved by the House of Lords in *Jacobs v. LCC.* [1950] AC 361 in which the question was whether a customer at a shop, occupied by a tenant of the defendants, who suffered personal injuries from the defective state of the forecourt, occupied by the defendants, was their licensee or their invitee. Lord Simonds, whose judgment was concurred by the other members of the House, held that the plaintiff was a licensee because three of the Law Lords in the rather similar case of *Fairman v. Perpetual Investment Building Society* [1923] AC 74 had expressed the view that such was the status of a person in those circumstances. There was no cross-appeal by the respondents against this finding of the learned Judge, and in our judgment, there was ample evidence to support it.

Having found that the deceased was an invitee at the time of the accident, the learned Judge proceeded to state the law governing the case as follows:

> But the deceased certainly was an invitee on the premises belonging to the defendants and as such they owed a duty to the deceased that he would not be placed in a position of danger or create a dangerous situation whereby injury would be caused to him. On the evidence before me I held that the defendants' servant, the foreman DW2 was negligent in the manner by which he handled the situation ...

At the hearing of this appeal, learned Counsel for the appellants had submitted that the learned Judge erred in law in holding that the duty of the appellants at common law, as occupiers, towards the deceased, as an invitee, was that he should not be placed in a position of danger or create a dangerous situation whereby injury would be caused to him. It was argued that the learned Judge had failed to apply the correct test, viz. in law the duty of an occupier towards his invitee is merely to use reasonable care to prevent damage from unusual danger or risk which the occupier knows or ought to know.

The leading case on liability to an invitee at common law was *Indermaur v. Dames* [1866] LR. ICP. 274 where a workman employed by a gasfitter went to a sugar-refinery to test some gas-burners and fell into an unfenced shaft. The occupiers of the factory were held liable for the accident and at p. 288 Willes J stated the principle of the invitor's liability in tort as follows:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

This statement of the law has long been regarded as an authoritative exposition of the duty owed by an invitor to an invitee and had been consistently accepted and applied by the House of Lords in numerous cases until the Occupiers' Liability Act 1957 (which came into operation in England and Wales on 1 January 1958) which abolished the distinction between invitees and licencees and classed them all as "visitors". The Act, which does not apply in Malaysia, put on the occupier the same duty to all of them viz. the common duty of care [per Lord Denning in *Wheat v. E. Lacon Co. Ltd.* [1966] 1 AER 582 at p. 593]. In Malaysia, the rule in *Indermaur v. Dames* was applied by the Federal Court in the case of *Lau Tin Sye v. Yusuf bin Muhammad* [1973] 2 MLJ 186. Special rules apply to the position of those who come as invitees upon premises. And the cause of action based on invitation is different, because it depends primarily, not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage) but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger [per Lord Wright in *Glasgow Corporation v. Muir* [1943] AC 448 at p. 460 and 463].

Applying this to that part of the judgment of the learned Judge where he purported to expound the law governing the relationship of an invitor and invitee, it is plain that the learned Judge erred in stating the law wider than that laid down in *Indermaur v. Dames* and purported to place the duty on the appellants on a much wider basis than is there postulated. In other words, the learned Judge would impose on the appellants a degree of care higher than the law exacts. In our opinion, a dangerous situation *per se* does not constitute "unusual" danger or risk.

The invitor's duty is confined to protection against "unusual" dangers and in *London Graving Dock Co. Ltd. v. Horton* [1951] AC 737 the House of Lords ruled that an "unusual" risk is one which is not usually found in carrying out the task which the invitee has in hand. In the Court below, the learned Judge did not deal with the issue of "unusual" danger in his judgment as this had not been pleaded by the respondents in their statement of claim. However, on the facts found by the learned Judge, we do not think the act of raising the forklift mechanically and using 2 rubber tree stumps to support the heavy horizontal iron bar, amounted to "unusual" risk. If this were so the respondents would have pleaded it in their reply. In our opinion, these facts might constitute "incidental or usual" danger which could reasonably be foreseen, by the deceased in the course of his employment.

In *Horton* case Lord Normand said at p. 751:

> The occupier has no duty to the invitee unless there is unusual danger which he knew or ought to have known ...

And at p. 758 Lord Oaksey in the same case observed:

> An occupier owes no duty to an invitee in respect of 'usual' dangers since the invitee is only entitled to expect that the invitor will take care to prevent damage from 'unusual' danger ...
>
> The onus of pleading and proving "unusual" danger which the appellants knew or ought to have known, rests on the respondents and since they had failed to establish it, the appellants owed no duty of care to the deceased. Much as we sympathise with

the dependants of the deceased, we have no alternative but to set aside the judgment of the Court below. The appeal is therefore allowed with costs here and below. The RM500 deposit to be refunded to the appellants.

Also found at [1983] 1 CLJ 231